No. 14575

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OVETA CULP HOBBY, Secretary of Health, Education and Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Statement of Facts.

Appellee finds it necessary to provide this Court with his own statement of facts in order that appellee's case may be presented in its proper perspective. The statement of facts in appellant's brief is incomplete and therefore does not provide that proper perspective so far as appellee is concerned.

Appellee was plaintiff in the District Court and is hereinafter frequently referred to as plaintiff.

Plaintiff, for some twenty (20) years prior to 1950, had carried on the business of operating a rooming house

or apartment hotel in a building owned by The First Methodist Church, most of which he rented unfurnished from said church, and he had no reason to believe that he would not continue to have said business indefinitely. The plaintiff rented from the owner a portion of said building unfurnished on a month-to-month basis and paid said church the full rental value of said real estate for the use thereof, although the church reserved a portion of said building for its own use. [R. 30-31, 44, 49, 66.]

Plaintiff furnished and serviced the 72 rooms in said building and supplied hotel-like services to the guests. In addition to supplying heat, light and janitorial services of a maintenance and custodial nature, plaintiff supplied additional services of a type primarily for the convenience of the guests, some of which were as follows:

1. Plaintiff was on duty in said building on a 24-hour-a-day basis and in addition he provided a manager and desk clerk who worked on a full-time basis and on whose salary plaintiff paid Social Security and other taxes, and whose duties included taking care of the various needs of the guests, as is the custom of such an employee in a hotel, including, among other things, receiving and sorting mail, taking messages for guests and rendering telephone service as below. He and his employee directed callers to the proper apartment of a guest [R. 28, 31-32, 46-47, 66-68];

2. He supplied linen such as sheets, pillow cases and towels for the guests and provided for laundering of same. Plaintiff made a charge for the launder-

ing, the receipts from which were declared and included as part of the income upon which his claim is based [R. 31, 45-46, 68];

3. Plaintiff provided telephones on each of the floors of the building and the manager or he himself would answer the telephone calls and call the guests to the telephone by means of a buzzer system. Telephone calls to which the plaintiff or the manager would call guests on some days numbered as many as 100 [R. 31-32, 66-67];

4. He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests [R. 31-32, 66-68];

5. He provided gas cooking stoves and paid all the utilities charges in connection with the use of same [R. 31, 45, 48, 67];

6. He maintained a workshop on the premises and a storeroom for tools and supplies and provided all of the repairs and work necessary to maintain the apartments such as plumbing, repair of window shades, stove repairs, carpets, and repairs to electrical wiring and equipment, all primarily for the convenient occupancy of and upkeep of the rooms and facilities occupied and used by the guests; he did regular renovating of the apartments, painting and cleaning them. He also showed apartments to prospective guests [R. 32, 46, 67];

7. He maintained a rubbish barrel on each floor of the building into which guests deposited refuse, and he or his employee would carry such rubbish to the

back of the building where it was picked up by a rubbish collector employed by plaintiff on a contract basis, the same method of collection was also afforded for cans and garbage [R. 47-48, 68];

8. He provided complete laundry facilities for all guests, including tubs, clothes lines and electric irons [R. 32, 66-68];

9. He supplied dishes and cooking utensils and utilities for all guests [R. 32, 46-48, 66-67];

10. He provided for the sorting and placing of guests' mail in mail boxes [R. 31-32].

Most of the guests paid their bills on a weekly basis [R. 47].

The said services were listed in a letter dated June 9, 1953, presented to the Referee at the time of the hearing, and in Appellee's affidavit to the Appeals Council. Although appellant in her statement of facts refers to said letter as an unsworn statement, probably for the purpose of trying to discredit said letter (App. Br. p. 4), it is submitted that the Referee had the letter before him and gave appellee to understand that he intended to consider said letter as evidence, giving it the same creditability as if the statements had been made under oath [R. 49], where it was said: "Q. Do you think I have everything in here I need to have in this case, with that letter you gave me?" and see said affidavit of July 31, 1953 [R. 30-33].

When the Social Security Act was amended in 1950, plaintiff in good faith complied with the terms thereof and

paid the self-employment tax required by the applicable statutes during the years 1951-52 [R. 51-55, 30-31].

Then the church, the owner of the real property, sold its property and the plaintiff in 1953 at the age of 73 found himself suddenly deprived of his said means of livelihood through the business which he had developed and carried on over a period of 22 years [R. 49-50].

Pursuant to law plaintiff made application for Social Security benefits and was denied same by the Bureau of Old Age and Survivors Insurance, and further denied same after hearing before a Referee. A request for a review of the Referee's decision by the Appeals Counsel was also denied [R. 64-65, 33-38, 25-26].

After denial by the Appeals Council of plaintiff's request for a review of the referee's decision, the decision of the Referee as thus approved by the Appeals Council became the decision of the Secretary.

Pursuant to Title 42, U. S. C. A., Sec. 405g, plaintiff then commenced these proceedings in the District Court to enforce his rights under the Social Security Act.

The District Court found that there was no substantial evidence to support the decision of the Secretary, reversed the same and ordered the Department of Health, Education and Welfare to commence payment of old age insurance benefits to appellee as of March, 1953 [R. 69-85].

Summary of Argument.

Appellee respectfully submits that the decision of the District Court holding that the plaintiff had income from self-employment upon which he paid social security taxes, according to the provisions of the applicable law, and was therefore entitled to old age benefits under the law, reversing the decision of the Secretary of Health, Education, and Welfare, was unerringly correct and should be sustained for the following reasons:

1. The only possible basis for denying the benefits to plaintiff would be if his self-employment income could be classified as rentals from real estate. The provision of the law excluding income from rentals from real estate is in the nature of an exception which must be construed strictly as opposed to the remedial provisions of the Act which must be construed liberally in favor of those intended to be benefited thereby.

2. There were no questions of fact involved. The evidence is uncontradicted. The only question was of law, to-wit: Did the facts show self-employment income on the part of Appellee as a matter of law, thus entitling him to the benefits of the Old Age and Survivors Insurance Act, *or* did the facts, as a matter of law, bring Appellee within the exception of income derived from "rentals from real estate" thus excluding him from the benefits of the Act.

The District Court decided, as a matter of law, that the facts were such as to establish that the plaintiff did derive his income as a self-employed person from services rendered by him in connection with his business in the operation of a so-called rooming house or apartment hotel, and not from rentals of real estate.

Plaintiff owned no real estate and paid to the owner of the same the full rental value of the portion of the building he used in his business. This rental was deducted in determining the self-employment income upon which he paid the social security taxes and upon which his claim for benefits is based.

The services rendered by plaintiff were in nature such as are rendered in operating a low priced hotel and included services primarily for the convenient use and occupancy of the premises by the guests as well as services which were merely custodial in nature.

The statute and regulations (based on the legislative history) intended that the payments for the occupancy of rooms where services were rendered of the very type rendered by the plaintiff do not constitute rentals from real estate.

3. The law requires that the Secretary make findings of fact. None were made. The decision of the Secretary was nothing more than a conclusion of law following a recital of the applicable provisions of the law.

The only portion of the Secretary's decision which might conceivably be called findings of fact were not supported by substantial evidence nor indeed by any evidence.

If the Secretary did consider all of the evidence she then based her decision on completely erroneous conclusions of law not justified by the facts as shown by the evidence.

4. There was no substantial evidence to support the findings of the Secretary and her decision based thereon.

ARGUMENT.

POINT ONE.

The Provision of the Law Excluding Income From Rentals From Real Estate Is in the Nature of an Exception Which Must Be Construed Strictly as Opposed to the Remedial Provisions of the Act Which Must Be Construed Liberally in Favor of Those Intended to Be Benefited Thereby.

The Social Security Act was amended in 1950 in order to include self-employed persons and to broaden its scope and increase the number of persons covered and benefited thereby.

Corpus Juris Secundum (81 C. J. S., 74-75) states the law as follows:

> "* * * Provisions for old age benefits were enacted in order to solve the problem of insecurity brought on by old age by providing for payments in the nature of annuities to the elderly. * * *. The Statutes providing for a system of old age benefits and for the raising of the necessary funds by certain taxes are remedial in scope, and should be liberally construed to effectuate their remedial objectives, and, hence, a liberal construction in favor of those seeking benefits is required. In other words, a construction of the statutes is required which will give effect to the intention of Congress in the light of the mischief to be corrected and the end to be obtained, * * *." (Citing: *Carroll v. Social Sec. Board,* 128 F. 2d 876, 881 (8, 9) and many other cases.)
>
> "The exception therefor should be strictly construed, and, at the same time, exceptions should be reasonably construed; they extend only as far as their language fairly warrants, *and all doubts should be resolved in favor of the general provision rather than*

> *the exception.* * * * However, an exception must be construed in conformity with the purpose and meaning of the statute, and words of exception used in a statute may be expanded or limited to effectuate the manifest reason and obvious purpose of the law. * * *" (83 C. J. S. 891-893, citing many cases.) (Emphasis ours.)

The legislative history of the 1950 amendment of Section 411, Title 41, U. S. C. A. clearly bears out our contention that following the foregoing rules plaintiff is entitled to the benefits which he sought before the Department of Health, Education and Welfare, and now seeks.

Referring to said history as set forth in the 1950 U. S. Code, Congressional Service, Volume 2, at pages 3452-3460, it becomes clear that the purpose of the exception was to exclude the income to owners of real estate from rentals which they collected therefrom requiring no important activity on their part other than the collection.

On the other hand, said history shows that businesses conducted in or on real estate, such as that of plaintiff, where the one conducting it devoted practically his full time to it, as in this case, were intended to be covered by the Act and not excluded by the exception. Among other things, said history states:

> "* * * *Payments for the use or occupancy of rooms or other space where services are also rendered* to the occupant, *such as* for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services * * * do not constitute rentals from real estate." (Emphasis ours.)

The Regulations of the Department of Health, Education, and Welfare in this same connection were based on the legislative history above quoted.

POINT TWO.

There Were No Questions of Fact Involved. The Evidence Is Uncontradicted. The Only Question Was of Law, To-wit: Did the Facts Constitute Self-employment on the Part of Appellee as a Matter of Law, Thus Entitling Him to the Benefits of the Old Age and Survivors Insurance Act, or Did the Facts, as a Matter of Law, Bring Appellee Within the Exception of "Rentals from Real Estate," Thus Excluding Him From the Benefits of the Act?

The uncontradicted evidence showed that:

Plaintiff devoted his full time to the operation of his said business, making himself available for, and rendering various services to, the guests which were primarily for their convenience.

The income included as income from self-employment in his tax returns and in his application for benefits was not received or derived from any real estate which he owned, but from occupancy of rooms which he furnished and equipped, and from services which he rendered to the guests.

It is true that in the operation of his business, from which was derived the income which he returned and claims as income from self-employment, he used real estate belonging to another but the full market value thereof was paid to the owner and deducted in determining the self-employment income upon which the taxes paid were based.

Plaintiff rented rooms to guests in a manner similar to a hotel or rooming house. From the payments he received from the guests he had to pay his operating ex-

penses which included a monthly payment to the landowner for the full rental value of the real estate. It is obvious therefore when plaintiff paid the landowner the full rental value of the realty that what he retained was the value of and payment for his services. When making his self-employment income return plaintiff excluded the rental value of the real estate before determining the self-employment income. It therefore, logically follows that no part of his said income was derived from real estate rentals but was derived solely from services.

Unquestionably if the plaintiff had been engaged by the owner of the real property to perform the same services as an employee as he rendered as a self-employed person the requisite taxes would have had to be withheld by his employer and the plaintiff would have been entitled to receive benefits under the Act. This is the type of situation which the 1950 amendment to the statute is designed to meet, that is, eliminating the possibility that a self-employed person rendering services practically identical to those rendered by an employed person be denied benefits under the statute while the employed person received the benefits.

If, however, notwithstanding the foregoing, the Court should desire to know the specific services rendered by Plaintiff in order to determine if such services are sufficient to constitute the income therefrom self-employment income rather than rentals from real estate the plaintiff respectfully submits the following, which is likewise uncontradicted.

The plaintiff, in the operation of his rooming house did, of course, render services such as providing heat and light, the cleaning of public entrances, exits, stairways, and

lobbies, the collection of trash, etc., as the Secretary recognized.

However, the question here *is* what additional services were rendered by plaintiff which were sufficient to show the payments to be income of the business in which appellee was self-employed rather than being included in the classification of rentals from real estate, *not* which services are *in*sufficient to change the character of the payments from rentals from real estate (which reverse approach apparently was the manner of approach to the problem by the Secretary, as will be pointed out later in this brief).

Section 404.1052 of Social Security Regulation 4 (16 Fed. Reg. 13074, 20 C. F. R. 404.1052) reads in part as follows:

> "*Generally,* services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, *for example,* constitutes such service; * * *" (Emphasis ours.)

The language of the said Regulation is not restrictive but is obviously intended to permit a broad latitude in interpreting the type of service which is for the guests' convenience. The term *"for example"* is certainly not restrictive, therefore it cannot be argued that unless maid service is rendered the other services are not primarily for the guests' convenience, as appellant attempts to argue.

Approximately two blocks from the rooming house where plaintiff operated his rooming house is the new Los Angeles Statler Hotel. A brief comparison of the opera-

tions of the plaintiff and that of the Statler would seem to be helpful.

It will be noted first that the plaintiff charged from $4.00 to $6.50 a week for his accommodations. It is submitted that a room for one night at the Statler would cost more. It is obvious therefore that the income strata of the persons involved is vastly different and the quality and number of services may be different.

It is submitted that both operations furnish the essentials such as heat, light, the cleaning of public entrances, exits, stairways, the collection of trash, etc.

However, both the plaintiff and the Statler render a telephone answering and call service, direct callers to proper rooms, both provide a lobby, a desk clerk, both provide mail sorting services. However, while plaintiff did not give maid service, he did provide complete laundering and ironing facilities including electric irons, ironing boards, clothes pins, clothes lines, and wash tubs, the latter services not being rendered by the Statler. Plaintiff provided newspapers and magazines in his lobby, for his guests, a service not enjoyed by the guests of the Statler. Plaintiff made an additional charge for laundering of linens which he supplied. Analogous thereto are the Statler charges for the use of its valet services. The plaintiff provided cooking utensils and dishes, provided gas cooking stoves and electrical appliances and paid all the utilities charges in connection with their use. The Statler does not provide cooking facilities although it provides meals in the rooms, a service for which an extra charge is made. The Statler maintains 24 hour service and so did the plaintiff who maintained an apartment on the premises and was on call 24 hours a day.

The comparison illustrates that the services plaintiff rendered to his guests, considering their economic strata and the prices paid for the accommodations, were considerable and the services were of such a nature and sufficiency for such accommodations that appellee's income from his small business was, as a matter of law, self-employment income and not in the category of rentals from real estate under the statute and the said Regulation 4, Section 404.1052.

It is respectfully submitted that the District Court was correct in directing the Secretary to pay the old age benefits provided by the Social Security Act to plaintiff without remanding the matter for further hearing. Section 405(g), Title 42, U. S. C. A. There were no questions of fact requiring determination.

It is also respectfully submitted that the decision of the Secretary, even if she had considered the facts, is based on an erroneous conclusion of law and for that reason should be reversed. See *Carroll v. Social Security Board,* 128 F. 2d 876, 881 (8, 9).

Said case involved an appeal from a judgment of the District Court affirming a decision of the Appeals Council of the Social Security Board which held that the plaintiff therein was not an employee under the terms of the Social Security Act. The Circuit Court reversed the decision of the Board as well as the District Court decision affirming the Board's decision.

The Circuit Court in its opinion stated

> "(8, 9) The purpose which Congress had in mind and the object sought to be accomplished by the enactment before us is aptly stated in Helvering v. Davis, 301 U. S. 619, 640, 672, 57 S. Ct. 904, 81

L. Ed. 1307, 109 A. L. R. 1319, *et seq.* That it should be liberally construed in favor of those seeking its benefits can not be doubted. While the question before us is not free from doubt—in fact, it is extremely close—we are of the opinion that plaintiff was an employee of the bank within the meaning of the Act and entitled to its benefits. In so concluding we have not overlooked the statutory admonition which binds us to accept the finding of the Social Security Board if supported by substantial evidence. The rule is not controlling, however, because the Board's decision, that plaintiff was not an employee within the terms of the Act, is without substantial support. *Moreover, in our view, the rule has no application because the question presents an issue of law rather than of fact. It involves a construction of the Act.*" (Emphasis ours.)

The question in the instant case is very similar. The question of whether or not plaintiff was a self-employed person within the meaning of the Act and whether or not the services rendered by the plaintiff brought him within the coverage of the Act was therefore a question of law.

For purpose of argument only, assuming that the Secretary had considered all of the facts (which she apparently did not) nevertheless in so miscontruing the statute (and Department Regulations) the Secretary made an erroneous conclusion of law in applying the facts to the applicable law and regulations.

The type and extent of the services rendered by plaintiff constituted the questions of fact which the Secretary had to determine but the legal effect of the facts was a conclusion of law. The problem before this court therefore is the same as in *Carroll v. Social Security Board (supra).*

The question in *Burger et ux. v. Social Security Board et al.,* 66 Fed. Supp. 619 (affirmed in *Miller v. Burger,* 161 F. 2d 992 (C. A. 9)) was the same. The question was whether or not the plaintiff therein was an employee under the provisions of the Social Security Act. In reversing the Social Security Board the District Court said (66 Fed. Supp. 619, at p. 628),

> "this claim presents 'a clear-cut question of law and is for decision by the Court.' * * * (citing authority including Social Security Board v. Nierotko, 66 S. Ct. 637, 643, 327 U. S. 358, 90 L. ed. 718, 162 A. L. R. 1445, from which the decision quotes). * * * 'For the reasons stated I hold that the Board's decision was contrary to law in refusing to recompute the monthly benefits * * *' "

Holding that plaintiff therein was an employee as a matter of law.

The Supreme Court of the United States in the said case of *Social Security Board v. Nierotko* stated,

> "The Social Security Board and the Treasury were compelled to decide administratively whether or not to treat 'back pay' as wages and their expert judgment is entitled as we have said, to great weight. *The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact* * * * *Administrative determinations must have a basis in law* and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. * * * An agency may not finally decide the limits of its statutory

> power. That is a judicial function. * * * *This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.*" (Emphasis ours.)

The writer does not have the temerity to try to improve on the eloquency and cogency of these statements of Mr. Justice Reed and submits that they are applicable to the instant case.

In *United States v. La Lone,* 152 F. 2d 43 (C. A. 9), cited by appellant in her brief, the court said:

> "* * * The Board's decisions interpreting the Act and regulations are entitled to weight; the Board's findings of fact, *if supported by substantial evidence,* are conclusive." (Emphasis ours.)

In *Miller v. Burger,* 161 F. 2d 992, 995, the court said:

> "While the findings of fact of the Social Security Board are supported by the evidence, we think its decision was incorrect when measured off against the language of the Act and the intent of Congress in adopting the 1939 amendment thereto."

The Court also stated (p. 994) that

> "We believe the ultimate question presented to the lower court was one of law,"

and affirmed the District Court's reversal of the Social Security Board.

It is clear from the foregoing two cases that the question of the construction of the Social Security Act for the purpose of determining the intent of Congress and

applying the law to the facts are questions of law. The decision of the Secretary is entitled to weight only, even if the findings of fact had been supported by substantial evidence. If this were not true then the decision of an administrative officer would be more conclusive than if decided by a trial court. Such is not the law.

Whether Congress intended under the 1950 amendment that a person receiving income under the same circumstances as the plaintiff herein, is entitled to benefits under the Act is an ultimate question of law. While the decision of the Secretary is entitled to weight if based on findings of fact which are supported by substantial evidence, such decision is not controlling if it conflicts with the intention of Congress in passing the statute (1950 Amendment here).

In the instant case it is clear from the legislative history *(supra)* that Congress did intend to include within the provisions of the Act persons deriving income from self-employment in the manner which plaintiff derived his income.

This was a question of law upon which the courts could be called to review as was done in this proceeding. The District Court's decision as to the law was correct and justified the reversal of the Secretary's decision.

POINT THREE.

The Law Requires That the Secretary Make Findings of Fact. None Were Made. The Decision of the Secretary Was Nothing More Than a Conclusion of Law Following a Recital of the Applicable Provisions of the Law.

Section 405(b), Title 42, U. S. C. A., reads:

> "(b) The Administrator (now Secretary) is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this sub-chapter."

Subdivision (g) of said Section 405, providing for a review of the Administrator's (now Secretary's) decisions states,

> "(g) Any individual, after any final decision of the Administrator (now Secretary) made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision. * * *. *The findings of the Administrator as to any fact, if supported by substantial evidence,* shall be conclusive, * * *" (Emphasis ours.)

A reading of the Secretary's decision makes it at once clear that it is not supported by any evidence let alone substantial evidence, and is in the nature of conclusions of law, not findings of fact.

The Secretary's decision after a recital of the statute and regulations, reads [R. 37-38]:

> "Since section 404.1052(a)(3) of the Regulations No. 4 provides that the furnishing of heat and light,

the cleaning of public entrances, exits, stairways, and lobbies, the collection of trash, etc., are not sufficient services in connection with the renting of rooms in rooming houses, it is the Referee's opinion that similar services rendered in connection with an apartment house are believed insufficient in connection with the renting of apartments in an apartment house, furnished or unfurnished, and that the rentals continue to be excluded as rentals from real estate. The claimant does not allege he is a real estate dealer.

"It is the finding of the referee that the claimant needed six quarters of coverage for a fully insured status; he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and up to January 19, 1953, constitute rentals from real estate and thus was excluded as net income from self-employment.

"Inasmuch as the claimant did not meet one of the principal requirements for entitlement to old-age insurance benefits, *i. e.,* he was not a fully insured individual, it is the decision of the referee that the claimant is not entitled to the benefits for which he has filed application."

This is the manner in which the Secretary disposes of all the evidence before her including the letter of June 9, 1953 [R. 66-68], which the referee acknowledged was in his possession at the hearing and which he indicated was being considered as evidence. [See R. 49, 3rd question from bottom of page.]

The Secretary ignored additional services rendered by plaintiff to his guests as shown by the uncontradicted

evidence such as telephone answering and call service, sorting mail and placing same in individual boxes, maintaining lobby with magazines and newspapers, providing linens, providing complete laundering facilities including wash tubs, clotheslines, clothespins and electric irons, providing a manager and desk clerk, being himself on call 24 hours a day to take care of any needs of the guests, providing all of the repair work necessary for the rooms or equipment, complete renovating of the rooms, supplying of all utilities including gas, water and electricity, supplying gas stoves, paying the utilities charge therefor, supplying all of the furniture and appliances, supplying cooking utensils and dishes, providing brooms for general use of the guests, and other services. [R. 29-33, 44-50, 66-68.]

It is at once obvious that the decision of the Secretary is a confused mixture in the nature of conclusions of law. There are *no* separate findings of fact.

The statute above quoted requires that the Administrator (Secretary), among other things, make (1) findings of fact, and (2) decisions as to the right of any individual applying for payments under the Act.

While the statute does not require specifically that the findings of fact be separate from the "decisions" it seems logical if the findings of fact are to be subject to judicial review to determine whether they are supported by substantial evidence that they must be stated separately. Otherwise how can any proper review of findings of fact be made.

Findings of fact and conclusions of law are always separated when made by a trial court in both our State and Federal Courts. As long as no definition of findings of fact is made the only logical conclusion that can be reached is that it means findings of fact as understood in our courts. It follows then because the courts require separate findings that the purpose of the statute was to maintain a standard of procedural due process of law at least similar to that of the courts and therefore under the statute separate findings of fact are required.

For purposes of convenience the above quoted portion of the Secretary's decision will be referred to as the "findings" unless otherwise pointed out.

These "findings" are obviously so incomplete and ignore so much of the evidence as to be no findings and of no value or assistance in determining whether the referee did or did not consider the evidence except as by omission they show that such consideration was not given.

The provisions of Section 405(g), Title 42, U. S. C. A., directing the Administrator (now Secretary) to "make findings of fact" can only be interpreted to mean "findings of fact" from which a reviewing court can determine what the Administrator (now Secretary) did find as a fact in order to support his conclusions.

The very fact that the Social Security Act provides for judicial review Section 405(g), Title 42, U. S. C. A., makes it clear that the Court must have "findings of fact" before it which meet some reasonable standard of

competence from which a proper and careful review of the decision can be made. Token findings of fact are certainly not sufficient. Mere lip service to the provisions of the statute do not satisfy the requirement of due process of law guaranteed by the Fifth Amendment to our Constitution.

The administrative branch may not use a procedural ruse to deprive the plaintiff of substantive property rights. Our judicial system is not sterile and our courts have not abandoned their place in our governmental system to the whim of an administrative officer whose actions may be masked in the guise of token findings of fact.

That the referee, in making his so-called "findings" apparently completely misunderstood the applicable law and regulations, is shown in the first paragraph of the quoted portion of his decision where he directs his attention to those services which are *not* sufficient to remove payments for the occupancy of space from the category of rentals from real estate, *whereas he should have found what were all of the services rendered by plaintiff* and based on such finding determined whether such services *were sufficient*. Certainly, therefore, the "findings" are not supported by substantial evidence.

The remainder of the so-called "findings" of the Secretary are actually conclusions of law reached from the aforesaid incorrect and incomplete basic premises.

The plaintiff does not wish to burden the court with long citations on the law covering substantial evidence and

judicial review of administrative decisions, however a few brief citations it is believed may be of assistance to the court. In the case of *Walker v. Altmeyer,* 137 F. 2d 531 cited by the Secretary in her brief, the court reversed the District Court which had reversed the Administrator. However, in that case it is apparent that the referee had made complete findings of fact.

In *United States v. La Lone,* 152 F. 2d 43 (C. A. 9), cited by appellant on page 16 of his brief, the court said on page 44:

> "We do not deem it necessary to relate in detail the facts as found by the Referee showing the relationship between La Lone and Barrett & Co."

This language indicates that in that case the referee did make findings of fact in some detail.

As pointed out above, in the instant case the "findings" of the Secretary indicate that much of the evidence was not even considered. They are not supported by substantial evidence but are based upon the omission of evidence from consideration and cannot therefore be accepted as conclusive.

POINT FOUR.

There Was No Substantial Evidence to Support the Findings of the Secretary and Her Decision Based Thereon.

There was no conflict in the evidence. The uncontradicted evidence, as indicated by our statement of facts hereinabove set forth with supporting references to the transcript, and the references to the facts which we have heretofore made in this brief, particularly under POINT THREE, show conclusively that the evidence is all in favor of appellee's position and no substantial part of it in support of the decision of the Secretary.

As the trial court indicated in its Memorandum of Decision [R. 72]:

> "There is no specific indication, nor any implication, in the referee's decision that he did not believe any of the plaintiff's evidence. While he undeniably had the power to disregard those parts of the plaintiff's testimony which he deemed untrue, it appears obvious that, rather, he took the facts as testified to by the plaintiff and corroborated by the documentary evidence, and, on the basis of these facts, concluded that the plaintiff was not within the definition of self-employed but, instead, derived his income from the rentals of real estate and thus was not entitled to benefits. Thus the material facts can be adduced by an examination of the plaintiff's testimony and the exhibits that were introduced, which include a statement by the plaintiff to the board, and a letter written by him to the referee.[2]

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[2]"There is no indication that the plaintiff was represented by counsel at the hearing. Rather, it appears that the examination was conducted by the referee. It is apparent that plaintiff's case was not presented as vigorously as it might have been. (63)"

POINT FIVE.

Answering Specific Arguments in Appellant's Brief:

A. The District Court Did Not Apply a Different Standard From That Set Forth in the Administrative Regulation But Applied That Standard in Its Proper Sense.

B. Counsel for the Secretary Attempts to Justify Her Decision Without Reference to Specific Findings and by, in Effect, Making New Findings in Her Brief Herein.

C. Appellee Concedes He Is Not Entitled to Recover Costs of Suit.

These are discussed separately below:

A. The District Court Did Not Apply a Different Standard From That Set Forth in the Administrative Regulations But Applied That Standard in Its Proper Sense.

The Secretary in her brief under Point I makes a fundamental error. She states:

> "The District Court erred in applying a Standard for Determining Whether Appellee's Income Was Derived from Rentals from Real Estate Which Differed from the Standard Set Forth in the Administrative Regulation." (App. Br. p. 10.)

The District Court did not attempt to apply a different standard. It interpreted and applied the administrative regulation to the facts in order to arrive at a proper conclusion of law [R. 70, 72, 74-76], after the Secretary's failure to do so. The District Court did not have the benefit of separate findings of fact and conclusions of law. The Secretary's decision, after a recital of the statute and regulations, was a confused mixture of conclusions of law and of some facts, ignoring other facts. The Sec-

retary apparently did not apply the standard set forth in the administrative regulations therefore it was left to the court to apply the applicable law and regulations.

The Secretary in her brief states on page 13 thereof:

> "The Court indicated that the *basis* of its decision was the bare statutory provisions without regard to the interpreting regulations yet nowhere was a finding made that the regulation is unreasonable or inconsistent with the 'statute.' "

This position is completely untenable. The District Court makes it clear without the slightest doubt that it did consider the administrative regulations. A glance at the court's memorandum opinion *in which it quotes from the Regulations* [R. 69-70] shows that.

Of course, the administrative regulations, as such, have no existence independent of the basic statute. When a statute is applied to a particular set of facts, even though regulations are consulted for the purpose of giving the effect to the statute which Congress intended it to have, nonetheless it is the statute, *not the regulation,* which gives life to the particular activity covered by the statute.

In making findings a court must set forth the ultimate facts found to be true. The finding, therefore, had to relate to what is covered by the statute, not by the regulation.

The only reasonable conclusion that can be reached, therefore, is that the administrative regulations unless found not to be applicable, or unconstitutional, are deemed to have been accepted as valid. And since it is the statute (and the constitution) from which the activity derives its life, the court's findings must so indicate and a finding that the statute covers a particular activity indicates the

ultimate question determined by the court. Plainly, therefore, the Secretary's argument is not here applicable.

However, following the Secretary's argument to its logical conclusion would result in clear constitutional violations. The administrative branch cannot usurp the prerogatives of the legislative and judicial branches. If the courts are bound by the interpretations of the law in administrative regulations and cannot legally construe the statute, then the courts have abandoned their constitutional prerogative to the administrative branch and have become the handmaidens of referees and hearing officers. If this were true, the fundamental safeguard of our American liberties, to-wit, the separation of powers between the legislative, judicial and executive branches of government, would have broken down. This cannot be the situation. The courts cannot be bound by administrative regulations in construction of a statute although the regulations are entitled to great weight.

The authority is abundant but we have only to look to the case of *Social Security Board v. Nierotko (supra)* to resolve any questions there may be in this connection.

B. Counsel for the Secretary Attempts to Justify the Decision Without Reference to Specific Findings, and by, in Effect, Making New Findings in Her Brief Herein.

The Secretary's brief (beginning at the bottom of page 16 through to the top of page 20) attempts to justify her decision and conclusion by referring to various criteria both in and out of the record (such as the reference to Los Angeles Municipal Code provisions referred to in Footnote 8, App. Br. p. 20).

The strikingly obvious thing about this attempt to justify the Secretary's decision is that counsel for the Secretary are applying their own standard based on their own interpretation of the evidence in the record. There is no reference to specific findings of fact of the Secretary. There was no evidence as to the Los Angeles Municipal Ordinances in the record.

There are only general references to the "findings" and to the "decision" of the Secretary. The reason for this is, of course, that there were no specific findings of the Secretary to which her counsel can refer or upon which she can rely or which support her decision. Counsel for the Secretary may not now, in appellant's brief, substitute new findings of fact for those which should have been made, while at the same time trying to show that the Secretary did make findings of fact which were supported by substantial evidence and that her conclusion based thereon was conclusive as argued.

The District Court determined that the Secretary's findings of fact, if they could be called findings of fact, were not supported by substantial evidence and therefore the court had to review the record and from said record make detailed findings of fact to support its conclusion and judgment that plaintiff was entitled to benefits under the Act. This was within the District Court's power under Section 405(g) of the Act, 42 U. S. C. A., which states in part:

> "The Court shall have power to enter, upon the pleadings and transcript of the record, a judgment

affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a re-hearing."

The District Court's findings of fact, which are supported by the evidence and the court's decision thereon surely are entitled to no less weight than that of the Secretary would have been if proper findings had been made and likewise supported.

The District Court's findings of fact herein being supported by the evidence and the conclusions of law being in accord with the statute, administrative regulations, and the legislative history, its judgment must be affirmed by this court.

C. Appellee Concedes That He Is Not Entitled to Recover Costs of Suit.

Under Point III, page 20, of the Secretary's brief, she contends that the District Court erred in awarding costs against her in her official capacity.

Plaintiff concedes that under the case of *Ewing v. Gardner,* 341 U. S. 321, cited by appellant, there was error in awarding costs against the Secretary. However, plaintiff wishes to point out that this is the only error in the District Court's decision.

In the said case of *Ewing v. Gardner (supra)* the Circuit Court of Appeals had affirmed the District Court which had reversed the decision of the Administrator. The Supreme Court reversed the Circuit Court (and the District Court) *only as to the awarding of the costs of suit*

against the Administrator. The reversal of the Administrator's decision by the judgment of the District Court affirmed by the Circuit Court, became the final judgment in the case *except only* as to costs.

Summary.

Appellee respectfully submits that the judgment of the District Court should be affirmed, but without costs, for the following reasons:

1. The remedial provisions of the Act should be construed liberally in favor of those intended to be benefited thereby and the 1950 amendment was intended to broaden the scope and increase the number of persons covered by the Act. The exception excluding "rentals from real estate" should be strictly construed.

2. There were no questions of fact involved. The evidence was uncontradicted. The only question was of law, to-wit: Did the appellee have self-employment income thereby entitling him to the benefits of the Old Age and Survivor's Insurance Act. The District Court decided, as a matter of law, that the facts established that the appellee did derive his income from services rendered as a self-employed person in connection with his business in the operation of a rooming house or apartment hotel, and not from rentals from real estate.

Plaintiff owned no real estate and paid to the owner of the same the full rental value of the portion of the building he used in his business. The rental was deducted in determining the self-employment income

upon which he paid the Social Security taxes and upon which his claim for benefits is based.

The services rendered by appellee were the type such as are rendered in low priced hotels and included services primarily for the convenient use and occupancy of the premises by the guests as well as services which were merely custodial in nature.

The statute (and the 1950 amendment) and the regulations (based on the legislative history) leave only the inescapable conclusion that Congress intended that payment for the occupancy of rooms where services were rendered of the type rendered by appellee do not constitute rentals from real estate.

3. The Secretary did not make findings of fact as required by the provisions of the Act. The decision of the Secretary was nothing more than conclusion of law following a recital of the provisions of the law. It can only be assumed therefore that the Secretary ignored a great portion of the evidence before her.

The only portion of the Secretary's decision which might conceivably be considered a finding of fact was not supported by any of the evidence let alone substantial evidence.

If the Secretary did consider the evidence her conclusion was based on an erroneous conclusion of law.

4. There was no substantial evidence to support the findings of the Secretary and her decision based thereon. The evidence was uncontradicted and all in support of appellee's position.

5. If appellee had rendered the same services as employee of another apartment hotel operator as he rendered in his own business as a self-employed person he would unquestionably be entitled to the benefits he seeks. Thus he is peculiarly within the classification of persons which the 1950 amendment was intended to bring within the protection of the social security system.

Respectfully submitted,

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